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No. 97-1509

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

TERRY L. STEWART, Director,
Arizona Department of Corrections, et al.

Petitioners,

vs.

PARIS HOYT CARRIGER,

Respondent.

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent Paris Carriger moves this Court for leave to file the attached Brief of Respondent In Opposition To Petition For Writ Of Certiorari without payment of costs and to proceed *in forma pauperis*.

Respondent has previously been granted leave to proceed *in forma pauperis* by the United States District Court for the District of Arizona, and counsel was appointed to represent him in those proceedings, and proceedings in the Court of Appeals

39 pp

under 21 U.S.C. § 848(q).

Respectfully submitted this 13th day of April, 1998.

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No. 97-1509

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October Term, 1997

TERRY L. STEWART, Director,
Arizona Department of Corrections, et al.

Petitioners,

vs.

PARIS HOYT CARRIGER,

Respondent.

On Writ Of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in finding that the evidence showing that Respondent is innocent of the crime for which he was convicted and sentenced to death is insufficient to preclude his execution under the Eighth Amendment, but sufficient to permit consideration of his otherwise-barred constitutional claims under Schlup v. Delo, 513 U.S. 298(1995)?

2. Whether, in a criminal case, the State has a duty to disclose to the defense record evidence in its possession impeaching the credibility of its principal trial witness?

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I. COUNTER STATEMENT OF THE CASE

Petitioners' Statement of the Case sets forth a version of the facts which accepts every detail of the trial testimony of the prosecution's key trial witness, Robert Dunbar. Pet. at 1-2. This is both procedurally inappropriate (because Respondent's Habeas Corpus Petition, which alleged a quite different set of facts, was summarily dismissed by the District Court below) and disingenuous: for the one thing in this case on which there is no longer any serious dispute is that Mr. Dunbar cannot be believed. Robert Dunbar, the prosecution's key witness, turns out to have been a big liar. Had the jurors seen Dunbar as we now see him, they would not have believed a thing he said. Pet. App. at B-2 (dissenting opinion); accord id. at A-8 (majority opinion) ("Dunbar was a known habitual liar accustomed to blaming others for his own crimes."); Pet. App. at D-5 (state postconviction judge) ("... Dunbar is a liar ....").

The decision below was framed by a careful recitation of the facts and state court proceedings which did not rely on any of Dunbar's various versions of the truth. There was no dispute between the majority and dissenting judges below about these basic facts, which we repeat here for the Court's convenience:

A. The Robbery and Murder

> In December 1977, Paris Carriger was released from prison, and soon contacted Robert Dunbar, a prison acquaintance. Carriger acquired a van and some tools, and began doing construction work. When he needed a place to stay, Dunbar agreed that Carriger could park his van on Dunbar's property and live in it. On March 12, 1978, Carriger parked his van next to the house Dunbar shared with his wife, Joyce Stevens, and her children.
>
> The next morning, March 13, Carriger called in sick at work. He then spent the day with Dunbar. The two visited a number of gun shops, and Dunbar eventually purchased a .22 caliber Luger pistol. Because it was illegal for

Dunbar, a convicted felon, to purchase a gun, Dunbar lied on the federal gun purchase form, falsely claiming to have no felony convictions. Later in the day, the two visited Shaw's jewelry store, where Dunbar had his watch repaired. After leaving the store, one remarked to the other that the store would be an easy place to "hit." Dunbar testified at trial that Carriger made this remark, though Dunbar later testified in postconviction proceedings that he said it himself.

The men returned to Dunbar's house from Shaw's store between 3:00 and 3:30 p.m., and then went their separate ways. They met again at Dunbar's house between 5:30 and 6:30 that evening. In the interim, the robbery and murder were committed at Shaw's jewelry store.

In their later testimony, Dunbar and Carriger each accused the other of committing the crime. Carriger testified at his 1982 postconviction hearing that upon returning to Dunbar's house shortly after 3:00, Dunbar got into an argument with his wife, at which point Carriger left in his van and went to a nearby restaurant. Carriger testified he then went shopping for jeans, browsed briefly in an adult bookstore, and returned to Dunbar's house. Parking his van, he walked to a nearby convenience store and back, finally returning at about 6:00. Carriger testified that shortly after his return, as he sat in his van listening to the radio, Dunbar showed up. According to Carriger, Dunbar had a guilty look, and was holding a pair of Carriger's boots. Dunbar allegedly told Carriger that Carriger should replace the boots because they were "hot," suggesting Dunbar had worn them during the commission of a crime. Carriger testified that Dunbar then showed Carriger a bag containing a half dozen watches, and offered the watches to satisfy a debt Dunbar owed Carriger. Carriger refused the offer.

Dunbar, on the other hand, testified at trial that upon returning home sometime after 3:15, he retired for a nap with his wife. He said he was awakened sometime between 5:30 and 6:30 by Carriger, who summoned Dunbar outside. According to Dunbar, Carriger said he had robbed Shaw's jewelry store, and asked for Dunbar's help in getting rid of "this stuff." Dunbar said Carriger took Dunbar outside to his van, where he showed Dunbar an attache case containing jewelry and watches, and asked for Dunbar's help in removing the tags. Dunbar testified that together they removed the tags from the jewelry, and placed the tags in a paper bag. Dunbar also testified that Carriger described how he had tied up Shaw and killed him by beating him with a skillet and then choking him with his own necktie.

Dunbar's and Carriger's stories agree that after they rejoined at Dunbar's house, both knew that at least a robbery had been committed. Shortly afterward, Dunbar and Carriger went out together. Their first stop was the home of Jackie White, Dunbar's stepdaughter, who had recently moved out of Dunbar's house and

who had a friendly relationship with Carriger. Carriger gave White two small cases, asking her to hold onto them. One of the cases turned out to be the case for the gun Dunbar had purchased that morning and contained only a gun cleaning kit, holster, and manual. The other case, an attache case, contained most of the stolen jewelry, the gun itself, and ammunition. The gun case and the cleaning kit inside it bore Carriger's fingerprints. The jewelry inside the attache case, however, bore only Dunbar's fingerprints, not Carriger's. The gun yielded no fingerprints.

Carriger and Dunbar then went to a massage parlor. While there, Dunbar produced a loose diamond taken from Shaw's and tried to sell it to a massage parlor employee. Dunbar and Carriger continued on to a shopping mall, where Dunbar again tried several times to sell pieces of the stolen jewelry that he had with him. While Dunbar showed the jewelry to a number of mall jewelers, Carriger bought new boots. The two then returned to Dunbar's house.

B. Dunbar's Role in the Investigation

The following morning, Dunbar contacted detectives of the Phoenix Police Department and told them he had information regarding the murder and robbery. He also told them he had committed a recent (unrelated) burglary, and wanted immunity in exchange for his information and testimony. Detectives met Dunbar at a mall coffee shop, where Dunbar gave them pieces of jewelry taken during the robbery. He told the detectives that Carriger had committed the robbery and murder, and had asked for Dunbar's help in selling the stolen jewelry and getting rid of the evidence.

Dunbar told the detectives that Carriger might be armed with the handgun Dunbar had purchased the previous day, and that Dunbar considered Carriger to be extremely dangerous. Dunbar said that Carriger would kill police officers if he saw them approaching the residence. At the detectives' request, Dunbar called Carriger with a lie designed to get Carriger out of the house. Once Carriger left Dunbar's house, police pulled his van over and arrested him. Carriger was unarmed and did not resist arrest.

Dunbar also told the detectives he and Carriger had gone driving north of Phoenix the previous evening to dispose of the evidence. According to Dunbar, Carriger threw evidence out the window as Dunbar drove. After arranging the ruse leading to Carriger's arrest, Dunbar retraced his drive of the previous evening accompanied by a homicide detective, and led the detective to evidence discarded along the roadside, including a jacket, gloves, and boots allegedly worn by Carriger during the robbery, business cards from Shaw Jewelers, Robert Shaw's wallet and driver's license, and the cut-up pieces of Shaw's credit cards. Dunbar

also directed police to the home of Ms. White, where they recovered the two cases Carriger had left the previous evening. Finally, Dunbar led police to a pair of jeans in the canal behind Dunbar's house, where he said Carriger had discarded them. The canal was nearly dry and the jeans were partially submerged in a shallow puddle. The jeans had a piece of one inside pocket cut out in a place where Carriger customarily marked his jeans with his name or initials.

One of the detectives who met Dunbar at the mall testified at trial that the detectives took the story Dunbar told them at face value. The same detective stated in a 1994 affidavit that one reason he took Dunbar's word was that he knew at the time that Dunbar was a longtime informant for the Phoenix Police burglary unit. That status was not made known to the defense or brought out at trial. Dunbar's history as an informant, as will be discussed, turned out to be somewhat less than reliable, and the detective who knew of Dunbar's informant status and took his story at face value in 1978 stated in his 1994 affidavit that he now believes Dunbar participated in Shaw's murder. Dunbar was never taken into custody, and neither his person nor his house was ever searched.

C. The Evidence and Arguments at Trial

At trial, Dunbar, granted the immunity he requested, was the state's chief witness. He testified that he had been home asleep at the time of the robbery, and that Carriger had awakened him and confessed the crime. Dunbar's wife corroborated Dunbar's testimony that the two had been asleep together between 4:00 and 6:00 that afternoon.

In closing argument, the prosecutor vouched for Dunbar's credibility, stating repeatedly that Dunbar was not a liar. The prosecutor assured the jury that "[i]f there was any indication of his [Dunbar's] guilt or complicity in this, he would be on trial with him [Carriger]."

In addition to Dunbar's testimony and the physical evidence Dunbar had provided to the police, the state presented two additional pieces of physical evidence against Carriger. The first was a key to the attache case containing the stolen jewelry, which the arresting officer testified was found in Carriger's wallet when he was arrested. The second was a single fingerprint of Carriger's, which was found on the adhesive tape used to bind the wrists of the victim. The tape was the same type as Carriger kept in a first-aid kit in his van.

Because Carriger did not testify at trial, he offered no direct explanation of the key. Defense counsel did introduce evidence showing it was possible to plant a key in Carriger's prison property locker, and suggesting that the only keys in Carriger's possession when he was arrested were keys to his van and Dunbar's

house. The defense explanation of the fingerprint was that the tape was Carriger's, and his fingerprint was already on the end of the roll when Dunbar took the tape from Carriger's van and used it to commit the crime.

D. Post-trial Discovery of Dunbar's Corrections File

As a result of court-ordered discovery in the 1982 state postconviction proceedings, Carriger's counsel for the first time obtained Dunbar's corrections file. The file revealed that Dunbar was well known by state authorities to be a liar. Using Dunbar's file, Carriger's 1982 postconviction counsel located prison superintendents, guards and fellow prisoners who testified that Dunbar was a pathological liar, with a reputation for manipulation and deceit well beyond even that expected in the generally dishonest prison environment.

Dunbar's file showed him to be a prolific career burglar, whose career included committing ninety-two burglaries in one six-month period. Most important, the file revealed a pattern of lying to police and shifting blame to others. After one commercial burglary, Dunbar falsely accused police officers of keeping money they recovered from him after his arrest. After another, Dunbar falsely accused the police of lifting his fingerprints from a water glass and then lying about it. Following a third commercial burglary, Dunbar claimed to have found the money lying in the street, and further claimed to have sought and received legal advice before deciding to keep it. Dunbar's pattern when caught lying was to seek a deal with the police as soon as possible. Following a 1976 burglary, Dunbar displayed behavior strikingly similar to his behavior following the 1978 Shaw robbery/murder: immediately after committing the burglary, Dunbar, on his own initiative, approached a police officer with a story to shift the blame for his burglary. Dunbar claimed that he had been robbed, and tried to paint the supposed robber as the one who committed the burglary.

Dunbar's corrections file revealed other facts inconsistent with Dunbar's trial testimony. Although Dunbar had testified that he was "not a robber" and had never used force, violence, or a gun in a burglary, his file contained admissions that he had committed armed robberies of savings and loans, that he had aided and abetted armed robberies of convenience stores, and that he had used a gun in at least one burglary. The file also contained a claim by Dunbar that he had been involved in a shootout with Phoenix police.

Finally, Dunbar's file revealed a long history of violence. Dunbar had been committed to the Arizona State Hospital because of violent rages and threats against his family, including an incident in which he wielded a knife against his parents, threatening to kill them. Dunbar was also dishonorably discharged from the Army for uncontrolled aggressive behavior and physical assaults. A

presentence report in the corrections file noted that Dunbar had been found manipulative toward other people, and that he reacted violently when he didn't get what he wanted. Another report stated that Dunbar had been diagnosed as having a sociopathic personality.

E. Dunbar's Confessions

In 1987, at an evidentiary hearing on Carriger's postconviction petition, Dunbar confessed under oath in open court that he had robbed Shaw's jewelry store and murdered Robert Shaw. He testified that he had committed the crime along with his wife, Joyce Stevens, and that he had framed Carriger to avoid prosecution. At the hearing, Dunbar described the crime in detail, including the layout of the store and the back room where Shaw's body was found. Dunbar accurately described the method of Shaw's death, and the position in which his body was left. He stated that his wife had first struck Shaw with the skillet, but that he then finished Shaw off with the skillet and the necktie. Dunbar stated that he and his wife had worn gloves during the crime, and that he had bound Shaw's wrists using adhesive tape from the first-aid kit in Carriger's van.

Dunbar testified that in the past he had often shifted the blame to others for his own crimes. He said that consistent with his past practice, his thoughts after committing the crime immediately turned to finding someone on whom to pin the blame. That someone, he testified, happened to be Carriger.

Dunbar also confessed the crime in a four-page letter to a woman with whom he corresponded through a prison ministry program. Dunbar's letter described the crime in sufficiently vivid detail that it frightened the ministry correspondent, who stopped her correspondence with Dunbar. The correspondent has declared in an affidavit that she reported the letter to the Arizona Attorney General's office, and was asked to forward the letter to them by mail, which she did. The Attorney General's office never stated whether it received the letter or knows of its whereabouts; the letter itself has never been produced.

Joyce Stevens testified at the 1987 postconviction hearing that Dunbar had confessed the crime to her. Several witnesses testified that after a 1981 television special on capital prisoners had included a profile of Carriger, Dunbar boasted that he had set Carriger up. Larry White, Joyce Stevens' oldest son, also testified that Dunbar once later described to him what it was like to see someone's head crushed with a skillet.

Shortly before his death in 1991, Dunbar again confessed, this time to his cellmate. He told the cellmate that he had killed Robert Shaw so that Shaw could not identify him, and that he had blamed Carriger to avoid taking the "fall."

F. Other Postconviction Evidence Implicating Dunbar

Joyce Stevens testified in 1987 that she had lied at trial when she corroborated Dunbar's alibi that he was napping with her at the time of the robbery. Stevens testified that Dunbar had a common practice of telling the children he was going to take a nap, and then slipping out of the house through a bedroom door leading outside, and committing burglaries while he was supposedly asleep. She stated that Dunbar did just that on the afternoon of March 13, 1978, leaving the house from the bedroom shortly after calling her into the bedroom to join him for a "nap." According to Stevens, Dunbar later told her he had committed the crime. Stevens explained that she had lied at trial out of fear of Dunbar, who had threatened her life and those of her children if she told the truth.[1]

Several of Stevens' children testified that Dunbar was an abusive and controlling figure, who regularly beat them and instructed them to lie to the prosecution concerning his involvement in this case. Stevens also testified that the day after the robbery, while she was doing the family laundry, she found the clothes Dunbar had worn the previous day, and that there was blood on the pants that she could not get out. She testified that when Dunbar saw the blood-stained pants drying on the porch, he became angry that Stevens had found them, and told her to leave his things alone. He took the pants, and she never saw them again.

Richard Fein, a close friend of Dunbar's, testified in July 1987 that Dunbar had told him several different times that his favored method of getting rid of evidence was to cut it up into pieces and then drive around the desert, disposing of it a little at a time, so it couldn't be connected up. Fein also testified that Dunbar described his technique for maintaining a consistent lie when he was shifting blame for his crimes to others.

Finally, both Stevens and her mother testified that Dunbar had often stated that he would never leave a witness to a crime he had committed.

G. Dunbar's Recantation of His Confession

Dunbar recanted his October 1987 sworn confession in a letter to the judge three weeks later. Recalled to the stand, Dunbar claimed he had falsely confessed

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[1]The dissent seizes upon an inconsistency between Dunbar's confession, which stated that he and Joyce committed the murder, and Joyce's recantation, which stated that Dunbar left the house alone. The dissent concludes that Joyce's recantation does not exonerate Carriger but supports the inference that Dunbar and Carriger acted together. There is no basis for this conclusion; the inference that Dunbar acted alone is at least equally plausible. There is no evidence that Dunbar and Carriger acted together to commit the murder.

PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

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212254(d)(8)(1994); Marshall v. Lonberger, 459 U.S. 422-432-35, 103 S.Ct. 843, 849-51 (1983).

Pet. App. at A-25 (footnote omitted).

The Court of Appeals meticulously read and analyzed the record to determine whether the bases for the state court finding--that Dunbar's confession was inconsistent with the physical evidence and that Dunbar had a motive to lie--were fairly supported. Id. at A-26-30. Only then did it conclude that they were not. Id. at 30.

C. The Court of Appeals Applied These Rules Properly.

Although this Court does not usually review facts, United States v. Johnston, 368 U.S. at 227, if it did in this case, it would affirm the Court of Appeals decision. The Court below properly applied the facts to the law, and concluded that in light of all the evidence, no reasonable juror would convict Respondent beyond a reasonable doubt on the testimony of Dunbar, an admitted perjurer. Pet. App. at A-36.

1. The Presumption Of Correctness Was Overcome.

The state court postconviction judge, who did not hear the trial testimony, found that Dunbar was a liar and perjurer, but credited his testimony at Respondent's trial when he was testifying under grant of immunity; and when, also under grant of immunity, he recanted the numerous sworn in and out-of-court confessions to the murder.[4] This credibility determination was not based on Dunbar's demeanor, but on the judge's analysis of the physical evidence, and

[4]In stark contrast, Dunbar's admission under oath that he murdered the victim and framed Respondent was given without immunity of any kind.

Dunbar's motives to lie.[5] Pet. App. at A-25-26.

After exhaustively reviewing the facts, however, the Court of Appeals concluded that the record did not fairly support that finding.[6] The physical evidence the state court pointed to--Respondent's fingerprint on the gun case and tape binding the victim's hand, an attache key found in Respondent's property, discarded clothes and boots--is not more consistent with Dunbar's trial testimony and his recanted confession. Id. at A-26-38. That is because all this evidence was tied to Dunbar.[7]

After calling the police, claiming to know who killed the victim (but first demanding immunity for recent burglaries he had committed and a gun he had illegally purchased), Dunbar

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[5]The state postconviction judge also stated that Dunbar's confession conflicted with the trial testimony of Jackie McCullar and Dennis Stevens, Pet. App. at D-3, but that, too, is not supported by the record. McCullar, Dunbar's step-daughter, testified that Dunbar and Respondent came to her house and Respondent asked her to hold two attache cases, one of which held the loot from the jewelry store that contained Dunbar's fingerprints, not Respondent's. At the postconviction hearing, Dunbar testified that he asked Respondent to ask McCullar to hold the cases. Dennis Stevens, Dunbar's eleven-year-old step-son at the time of trial, had supported his mother's much-needed alibi for Dunbar at Respondent's trial. Dennis, however, recanted that testimony in the state postconviction proceedings, admitting that everything he said was scripted by Dunbar.

[6]As noted, the author of the dissent also agrees that this finding by the state court is not fairly supported by the record. Carriger v. Stewart, 95 F.3d at 759 ("the record does not support the state court's finding that Dunbar's October 1987 testimony is less consistent with the physical evidence and witness testimony than his testimony at trial and in December 1987").

[7]Former Chief Justice Feldman of the Arizona Supreme Court recognized long ago that the case against Respondent rested exclusively on the credibility of Dunbar:

> There was no direct evidence of Carriger's guilt. The case was tried, therefore, on a simple basic issue: Did Dunbar tell the truth when he blamed the robbery and murder on Carriger, or was Carriger's contention that the robbery and murder were committed by Dunbar to be believed?

State v. Carriger, 692 P.2d 991, 1012 (1982)(Feldman, J., dissenting). Justice Feldman was alone in his conclusion that Petitioner's conviction should be reversed (for ineffective assistance of counsel), but the rest of the Arizona Supreme Court Justices agreed on this point: "There is no doubt that Dunbar's testimony was important to the state ...." Id., 692 P.2d at 1007. The State also "candidly concede[d] that ... the key to the case lay in Dunbar's credibility." Id., 692 P.2d at 1014.

gave police jewelry (a ring, a diamond stone, a watch) stolen from the homicide scene.[8] He then took police to the attaché cases containing more stolen jewelry, with his, but not Respondent's, fingerprints on it. Respondent's fingerprint was found on a gun cleaning kit inside the second attaché case. That was not surprising or condemning because it was never disputed that Respondent was with Dunbar when Dunbar purchased the gun and the gun cleaning kit. Pet. App. at A-28.

Dunbar also lead police to clothes and shoes allegedly worn by Respondent during the bloody crime. Although trial testimony revealed a bloody crime scene with blood spattered five feet up the surrounding walls, the clothes Dunbar showed police, including a pair of jeans, had no blood on them. One shoe contained droplets of blood so minuscule it could not be determined whether the blood was even human, much less the victim's. In his sworn confession, Dunbar admitted planting the pair of jeans and having worn the boots.[9]

The state repeatedly trumpeted the fact that a single fingerprint linked to Respondent was found on adhesive tape binding the victim's hands. Like every other item of evidence, however, that tape, too, was linked to Dunbar. Dunbar had access to the roll of used adhesive tape stored in a first aid kit in Respondent's van which would have had Respondent's fingerprint on it.[10] In

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[8]Dunbar also openly attempted to sell the stolen jewelry all over town shortly after the crime.

[9]Dunbar tried on the boots during the postconviction proceedings and they fit him.

[10]At the 1978 trial, the prosecution experts testified that they could not identify the location of the fingerprint on the wadded tape binding the victim's hands, and the fingerprint could have been present on the roll of tape before it was used to bind the victim's hands. As explained below, in 1987, without notice to anyone, the State removed the trial exhibits containing the wadded tape and the latent fingerprint identified as belonging to Respondent from the court exhibit room. After destroying the wadded configuration of the tape, the State later tried to introduce testimony that the location of the fingerprint could now be identified at a place where Respondent could not have left it prior to the crime. The state court refused to admit this testimony, and did not rely on it in making his credibility determination.

his 1987 confession, Dunbar admitted taking this roll of tape from Respondent's van to the crime scene and using it to bind the victim's hands.

The only other evidence the state court pointed to was a key that opened the attaché case containing the stolen jewelry. This mysterious "second" key[11] was allegedly found on Respondent when he was arrested--but the property envelope prepared by jail personnel at the time Respondent was booked into jail, as well as the testimony of the officer who booked Respondent into jail, established that Respondent had only one key.[12]

Thus, as the Court of Appeals found, every item of evidence fit with the conclusion that Dunbar committed the crime and then used evidence taken from Respondent to frame him for it. A determination that evidence is "as consistent" with one scenario as another, is tantamount to a conclusion that neither of those scenarios has been proved beyond a reasonable doubt.[13]

The Court of Appeals also found record evidence not considered by the state court that

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[11]It is undisputed that Respondent had a house key to Dunbar's residence at the time of his arrest.

[12]Given Dunbar's long-time history as an informant for the police and the ease with which he handled and handed over at his pleasure stolen property from the robbery-murder, and was never once personally searched by police, or had his home searched, the appearance of the second key in Respondent's jail property shortly before the trial began is not at all surprising. The evidence showed that property for an inmate, including a key, can be sent to the jail through the mail, and that property will be stored by the jail in the inmate's property. Moreover, as the Court of Appeals recognized, what was incriminating was not possession of the key to the attache case containing the stolen jewelry, but the fact that Dunbar's fingerprints were on the jewelry inside the case, not Respondent's. Pet. App. at A-27.

[13]Petitioners contend that because the Court of Appeals concluded that the physical evidence was "as consistent" with Dunbar's confession as with his trial testimony, the state court's finding that Dunbar was credible when he testified at Respondent's trial, but not when he recanted that testimony, is "fairly" supported by the record. Pet. at 12. Ordinarily, that would be true. If Dunbar were believable, a factfinder could have decided to accept his explanations for his possession and knowledge of the physical evidence and conclude beyond a reasonable doubt that Respondent had committed the crime. But the critical point Petitioners miss is this: the record is indisputable, and all the state and federal courts are in agreement, that Dunbar is not believable but "a liar". That is why the state court did not, and could not, rely on his Dunbar's testimony to support his finding, but turned instead to analyzing the physical evidence.

supported Dunbar's confession. Pet. App. at A-28-29. At Respondent's trial, Dunbar testified that he had never been in the back of the jewelry store where the crime occurred. In 1987 when he confessed to murdering the victim and framing Respondent, Dunbar accurately diagramed the back of the jewelry store, the location of the safe, and the location and position of the victim's body when it was found in the bathroom of the store in a way that only a participant in the crime could have done. When Dunbar later recanted his confession, he attempted to explain away his earlier testimony by claiming that Respondent's counsel had earlier shown him diagrams of the store and trial testimony about the crime scene. That testimony was proven false. Pet. App. at A-29.

Also, Dunbar's testimony about the reasons he "falsely" confessed were shown to be untrue. Dunbar testified that his lawyer knew he was testifying falsely when he admitted to being the killer, but that his lawyer had conspired with him to create this fabrication to sell this story and obtain proceeds from the resulting book and movie deals. That, too, turned out to be untrue. Id.

In analyzing Dunbar's other motives to confess, the Court of Appeals concluded that although Dunbar did have some motive to lie because he was angry at his ex-wife and the State, the state court failed to consider the significance of Dunbar confessing under oath without immunity. This was the first, and only, time Dunbar testified without immunity. His confession was based on his belief that he was dying; he said he couldn't face his maker with this sin on his conscience.[14] When Dunbar was later asked to explain why he was recanting his confession, he

[14]Although Dunbar was in fact quite ill at the time, he lingered for another three years. He died in 1991.

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maintaining a lie when he was framing someone else for his criminal acts. It considered Dunbar's history of violence and blaming others for his crimes. Pet. App. at A-37.

Without Dunbar, the circumstantial evidence is not sufficient to support a reasonable juror finding beyond a reasonable doubt that Respondent committed this crime. This is especially so in light of Dunbar's numerous statements to friends, family, and others, as well as his court testimony.

Petitioners contend, however, that the Court of Appeals erred by not considering the testimony they proffered in the 1987 state postconviction proceedings in an attempt to demonstrate that the location of Respondent's fingerprint on the wadded tape binding the victim's hands was at a spot where it could have only been placed after the tape was unrolled. Unlike the state court (and the previous Court of Appeals' panel decision), the Court of Appeals did consider that proffer. But for a number of reasons, it gave it "little weight." Pet. App. at A-26-27.[16]

One reason is that Respondent has been unable to examine the tape "in either reconstructed or unreconstructed form, or to have its own expert test the state's criminalist's conclusions." Pet. App. at A-27. Although a court reviewing a claim of miscarriage of justice can consider "the probative force of relevant evidence that was either excluded or unavailable at

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[16]Although the author of the dissent makes much of this proffered evidence, he did not do so in the Court of Appeals' panel decision which he also wrote. There, the proffered evidence was given no weight. Carriger v. Stewart, 95 F.3d at 761 n.13. In now deciding to give weight to the proffer, the author states that he has "trouble imagining" how a preexisting fingerprint on tape could be exposed when "[t]he usual way of applying tape" to bind an object like "a package" is to overlap the tape as it is being wrapped so that the "second layer of tape [is] on the top of the first." Pet. App. at B-17. Perhaps that perfection is common when one is wrapping packages, but that is not what was achieved when the victim's hands were bound in this messy robbery-murder. The wad of tape revealed anything but perfect binding. Many areas of the layers of tape were exposed in the zigzagging, haphazard binding. That is likely why the state's expert at trial stated that he could not determine the location of the latent on the roll of tape.

trial," due process requires that the evidence at least be reliable. Schlup v. Delo, 513 U.S. at 327-328. The most basic tenet of due process is the right to examine and challenge adverse evidence. See Gardner v. Florida, 430 U.S. 349, 358 (1977); In re Oliver, 333 U.S. 257, 273 (1948). A habeas petitioner "is entitled to know the factual material on which the [decision maker] ... relies for decision so that he may rebut it." Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288 n.4 (1974); see also In re Ruffalo, 390 U.S. 544 (1968).

Despite repeated requests made since Petitioners removed this trial exhibit without notice to, or permission from, the court, or Respondent's counsel, Respondent has not been given a chance to have this handiwork examined by an independent, or defense, expert.[17] When the State first attempted to present this testimony, and Respondent objected to it, the state court excluded it as "irrelevant" and placed no reliance on it.[18] In later state and federal postconviction proceedings when Petitioners tried once again to rely on this "evidence," Respondent again requested, and was denied, permission to test the validity of this experiment.[19]

Another reason the Court of Appeals gave this evidence little weight was the inconsistency of the expert's testimony as to the location of the latent to the end of the roll of tape. While Petitioners complain that the Court of Appeals misread the record, Pet. at 19, the

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[17]Respondent also objected to the State's expert's destruction of the original configuration of the tape in attempting to "reconstruct" it. The State's expert did this when he tore the wad of tape apart and attempted to piece the strips back together--a task he admitted he had never done before.

[18]This proffered evidence was inconsistent with other evidence as well, including the fact that this was the only latent print found on the wadded tape or roll of tape, and the State's theory at trial was that the robber-murderer wore gloves.

[19]Unlike the state court, however, the District Court, despite inexplicably denying Respondent's request to have that evidence released for independent examination, relied on it in denying Respondent relief. Respondent challenged that action on appeal.

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prison records of key witnesses showing drug use during time they were testifying constituted Brady violation).

This duty to disclose is especially applicable here where Dunbar was known by the prosecution to be a convict, was known by the lead detective to be a long-time informant, was given complete immunity in exchange for his testimony despite the fact that he was tied to all the evidence and the police believed he was involved in the crime. In fact, based on these facts, it is surprising that the prosecution would have offered Dunbar complete immunity without investigating his records.

Petitioners' alternative claim that it should have been excused from the duty of disclosure because Respondent asked his trial counsel to obtain Dunbar's prison file is more plausible legally, but untenable on the record of this case. In fact, it is a reversal of the position taken by the Arizona Attorney General's office in state court, where it argued vociferously that Respondent's counsel could not have obtained Dunbar's prison file if he had tried to:

> Ariz.Rev.Stat.Ann. § 31-221 prohibits the Department from disclosing [prison] files to the public, including inmates and defense attorneys. That statute was in effect at the time of petitioner's arrest and trial, between March and July 1978. In April, 1978, the court of Appeals held that inmates' files were not to be disclosed to him. Ortega v. Holmes, 118 Ariz. 433, 577 P.2d. 741 (Ct.App. 1978).

State v. Carriger, No. CR-101609, States's Memorandum Regarding Post-Conviction Relief Issues, at 1-2 (Oct. 27, 1982).

Moreover, the record also shows that trial counsel did not know the information contained in Dunbar's prison file. While courts have found that where the defendant has specific knowledge of the impeachment or exculpatory evidence, the State is relieved of its independent

duty to disclose that information,[22] they have never relieved the state from its duty to disclose where, as here, counsel has no such specific knowledge. Counsel did not know that Dunbar was a violent sociopath and pathological liar who had a reputation for framing others for his crime. Counsel did not know that Dunbar was a long-time informant for the Phoenix Police Department, and that was why the police did not search him or his home, or that this was why Dunbar was not charged with this crime even though the police considered him a suspect.

The record shows that, although Respondent's trial counsel did precious little to confront Dunbar, the few attempts he did make to discover information about Dunbar were effectively thwarted by the State and its agents. For example, during the trial, the prosecutor moved in limine to preclude defense counsel from "inquiring into past prior bad acts that have not resulted

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[22]See Routly v. Singletary, 33 F.3d 1279, 1285 (11th Cir. 1994)(where defense counsel learned during deposition that witness had been given immunity in exchange for her testimony and counsel disclosed that fact to jury in his opening statement, and cross-examined witness on immunity agreement, no Brady violation occurred); United States v. Meinster, 619 F.2d 1041, 1045 (4th Cir. 1980)(where witness promised nothing in exchange for testimony in North Carolina case, but was promised by prosecutor in Florida case that if witness cooperated in Florida case that fact would be brought to attention of North Carolina judge, and defense counsel was specifically told these facts, witness had no motive for falsifying his testimony in North Carolina case and defense counsel knew all these facts); United States v. Prior, 546 F.2d 1254 (5th Cir. 1977)(letter sent to defendant and contained in defendant's files did not constitute withheld Brady material).

The other cases Petitioners and the dissent rely on for this proposition are equally inapplicable to this case where defense counsel had no knowledge of the contents of the file. See, e.g., Rector v. Johnson, 120 F.3d 551, 560(5th Cir. 1997)(undisclosed statement from clerk at convenience store where defendant was earlier before crime who did not testify at defendant's trial was not relevant or material, and witness could have been discovered by defendant who knew where he was before the crime); United States v. Flores-Mireles, 112 F.3d 337, 340-341 (8th Cir. 1997)(no Brady violation where evidence on tape recordings of controlled buys of illegal drugs which were disclosed to the defense during trial and unidentified latent fingerprint, also disclosed during trial, were not favorable to defendant); United Sates v. Iverson, 648 F.2d 737, 738 (D.C. Cir. 1981)(where record is unclear whether defense counsel knew true facts of sentencing status of principal prosecution witness, remand required); Ross v. Heyne, 638 F.2d 979, 986 (7th Cir. 1980)(where defense counsel knew that co-defendant's testimony denying that he was testifying pursuant to a plea agreement was false but did nothing to correct it because of a conflict of interest, prosecution also knew and also did not correct it, but defendant knew none of this, new trial granted); Hampton v. United States, 504 F.2d 600, 601 (10th Cir. 1974)(where defense informed that cashier's check had been examined by lab but defense did not request results of that exam, no Brady violation occurred); Wallace v. Hocker, 441 F.2d 219, 220 (9th Cir. 1971)(where defense knew liquor bottle left at scene of crime and that defendant made statements after crime indicating his state of intoxication, but did not request production of bottle or statements, no Brady violation).

in convictions," stating:

> [Dunbar] has a series of arrests, a reputed burglar in town. He has been around a long time. The police rap sheet exposed to Mr. Gay that he may or may not have been involved in a lot of other things, although there is not enough evidence to charge him with it.

The prosecutor said nothing about the real reason Dunbar was not charged with his involvement "in a lot of other things": Dunbar worked as a police informant, providing information about the alleged criminal activities of others, in exchange for criminal charges being dismissed, or not pursued, against him.

Later, the prosecutor argued to the court:

> The risk [of allowing defense counsel to cross-examine Dunbar about his nonfelony criminal activity] is this: What they are looking at here is a fellow goes to the police and volunteers information and gets immunity, who has done a burglary and who has told the truth about doing that burglary. [Dunbar's prior bad acts] doesn't impeach him at all. But what it does is creates the idea in their minds that this fellow is going around town doing burglaries. It puts him on [sic] issue.

Of course, the prosecutor knew that is exactly what Dunbar was doing: going around town doing burglaries. But instead of being charged, prosecuted and punished for those crimes, he was "informing" on others and blaming them for his own acts.

In addition, the record at trial reflects the following exchange between defense counsel and the lead detective for the Phoenix police on the case:

> Q. Had you done any investigation as to who Mr. Dunbar might be or what his background was before you went to the meeting with him?
> A. No.
> Q. You didn't know at that time whether he had felony convictions or outstanding warrants or things of that nature?
> A. No, I did not.
> Q. Did you ultimately determine what Mr. Dunbar's background was, in terms of whether he was a convicted felon and that sort of thing?

A. Yes.
Q. What did you discover in that regard?
A. I believe he is a convicted felon, convicted of burglary, as I recall.
...
Q. And did you not also discover, in addition to the fact he was a convicted felon, did he not also concede to you that he was committing or had committed other burglaries in the recent past that he had not been charged with?
A. Yes, he did.
Q. How many additional burglaries did he admit he had committed, other than those he had been convicted for?
A. One.
Q. Did you determine how many felony convictions Mr. Dunbar had for burglary, sir?
A. Convictions, I believe two.
Q. Was Mr. Dunbar arrested or charged with the burglaries that he had admitted to you that he had committed that he had not been charged for or charged with?
A. No, he was not.
Q. Why not, sir?
A. I believe he was granted immunity by the County Attorney's office.
Q. And why?
A. As a witness in this investigation.
Q. Was that immunity granted at your request or did you play any role in the request of the County Attorney to give immunity to Mr. Dunbar?
A. I believe the decision was made by Mr. Rizer of the County Attorney's Office.
Q. Mr. Rizer, being a prosecutor, ultimately that would be his decision, as opposed to the officer's? In other words, you don't have authority to grant immunity?
A. That's true.
Q. Did Mr. Rizer grant immunity to Mr. Dunbar,because you requested that take place, sir?
A. No, I don't believe we requested it. It was justa matter of his deciding that it would be done.
Q. Do you know why that decision was made to grant immunity to that individual?
A. No, I really don't know the total extent, other than the fact that he would be available as a witness.

R.T. 7-12-84 at 14, 18-19.

Nowhere in this lengthy exchange about Dunbar's background and his continuing criminal activity does the detective disclose that Dunbar was a police informant and avoided

felony charges by providing information to the police about the alleged activities of others, and that although the police suspected Dunbar of being involved in this crime, they did not search him or his house. Exh. 16 to Petitioner's Excerpt of Record; Pet. App. at A-18. This same detective instead told the jury that he did not consider Dunbar a suspect in this crime. R.T. 7-12-78 at 16.

We thus submit that the Court of Appeals made no new law, but faithfully applied the rule of Brady and Kyles, in holding that Respondent was denied due process by the State's failure to disclose the information it had which undercut Dunbar's credibility. However, even if it were correct, as Petitioners contend, that it was the fault of trial counsel and not the State that this information was not brought out, Respondent's trial would be nonetheless unconstitutional. The Court of Appeals recognized this, noting that the flip side of the Brady issue in this case was the question of whether Petitioner was denied effective assistance of counsel at trial, an issue that has never been squarely decided by any court because of the procedural bars that have now been overcome by Respondent's showing of actual innocence. See Pet. App. at A-40.[23]

III. IF REVIEW IS GRANTED, THE COURT SHOULD ALSO CONSIDER WHETHER THE COURT OF APPEALS PROPERLY APPLIED THE EIGHTH AMENDMENT RULE RECOGNIZED IN HERRERA V. COLLINS.

For all the reasons given above, this Court should deny Petitioners' request to grant certiorari. Should this Court grant certiorari, however, it should also review the Court of Appeals decision on the standard to be applied in determining a freestanding claim of innocence precluding execution under the Eighth Amendment, of the type recognized by a majority of the

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[23]Thus, if this Court were to grant certiorari and reverse on this claim, this and other constitutional claims remain to be resolved.

Justices of this Court in Herrera v. Collins, supra.

The Court of Appeals, like most of the lower federal courts, assumed that Herrera forbade the execution of innocent persons.

Pet. App. at A-31. Several opinions in Herrera made up the majority holding this to be so. Herrera v. Collins, 506 U.S. at 419 ("the execution of a legally and factually innocent person would be a constitutionally intolerable event")(O'Connor, J., joined by Kennedy, J., concurring); id. at 431 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting)("[I]t is crystal clear that the execution of an innocent person is `at odds with contemporary standards of fairness and decency.'"); see also id. at 429 (White, J., concurring)("I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional [an] ... execution").

This Court did not, however, identify in Herrera the showing needed to establish this claim because it found the petitioner had not made the "extraordinarily high" threshold showing of innocence required to support such a claim. Id., 506 U.S. at 417. The majority opinion stated only that the petitioner would need to make "a truly persuasive demonstration of `actual innocence'". Id.

Respondent argued that he made this showing, and adopted the most demanding of the standards set out by the separate opinions: "that based on the proffered newly discovered evidence and the entire record before the jury that convicted him, `no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.' Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979)." Herrera v. Collins, 506 U.S. at 429 (White, J.,

concurring). This modified Jackson standard strikes the appropriate balance between the principles of finality and comity and society's interest in avoiding the execution of an innocent man. See Addington v. Texas, 441 U.S. 418, 423 (1979). Respondent showed that his guilt could not be found beyond a reasonable doubt without reliance on the testimony of Dunbar--and that no rational finder of fact could rest a criminal conviction on the testimony of Dunbar, who, as the lower state and federal agree, indisputably perjured himself in his testimony in this case (probably more than once) and who the state and federal courts found was a liar.

The Court of Appeals, however, rejected this standard, and instead held that a habeas petitioner must show the "more demanding" standard announced by Justice Blackmun in his dissenting opinion, and offer "affirmative[] pro[of] that he is probably innocent." Pet. App. at A-32. Although apparently agreeing that no reasonable juror could convict Respondent based on this record, the Court of Appeals held this was not enough and that Respondent must present affirmative proof of innocence, "for example, demonstrating he was elsewhere at the time of the murder [or] new and reliable physical evidence, such as DNA, that would preclude any possibility of Carriger's guilt." Id. at A-33.

Unlike Herrera, this case thus squarely presents the question of which of the several tests posited by the opinions in that case governs this important Eighth Amendment question. If the test formulated by Justice White is the correct one, Respondent's showing of innocence should have independently precluded his execution. The utter discrediting of Robert Dunbar now acknowledged by every court, combined with the ambiguity of the circumstantial evidence in light of Dunbar's various confessions and admissions, makes it more than just probable that no jury would convict Respondent; it makes it clear that no rational juror could convict him under

the constitutional test of proof beyond a reasonable doubt.

If the court decides to reexamine that evidence and review the Court of Appeals' application to it of the test of Schlup v. Delo, it should at the same time consider and define the proper test to be applied to claims of innocence under the Eighth Amendment, which was discussed but not resolved by the Court's various opinions in Herrera.

IV. CONCLUSION.

The Petition for Writ of Certiorari should be denied.

Dated this 13th day of April, 1998.

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No. 97-1509

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

TERRY L. STEWART, Director,
Arizona Department of Corrections, et al.

Petitioners,

vs.

PARIS HOYT CARRIGER,

Respondent.

PROOF OF SERVICE

I, Denise I. Young, do declare that on this date, April 13, 1998, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Joseph T. Maziarz
Assistant Attorney General
Office of the Attorney General
1275 W. Washington
Phoenix, AZ 85007-2997
(602) 542-4266

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 13, 1998